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### Models of Pre-Promulgation Review of Legislation

Rachel Myers

Indiana University Maurer School of Law, [rajmyers@iu.edu](mailto:rajmyers@iu.edu)

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# **Models of Pre-Promulgation Review of Legislation**

RACHEL J. MYERS\*

## **I. INTRODUCTION**

Pre-promulgation review seeks to harmonize legislation with the constitution by engaging in a dialogue among government institutions that seeks to prevent unconstitutional legislation from becoming law. Pre-promulgation review is an integral part of the lawmaking process, and this study seeks to unite scholarship on different methods of this review in a comparative survey to assist lawyers, policymakers, and scholars. A wide range of institutions may fulfill the function of reviewing proposed legislation for compliance with the constitution or other codes of national importance prior to their passage into law. Because of this diversity, scholarship on the topic of pre-promulgation review is split between discussions of legislative debate and judicial review by courts, rather than as a distinct mechanism. The following analysis presents seven models of pre-promulgation review currently in practice around the world, further divided into subcategories for a total of thirteen approaches. This taxonomy of pre-promulgation constitutional review of legislation presents a framework for thinking comparatively about the various mechanisms currently in use across the world. Rather than a comprehensive catalogue, the purpose of this taxonomy is to provide a concise overview of overarching commonalities of states' pre-promulgation review mechanisms to provide categories of the approaches. The framework invites further development through additional cases and refinement of its categories as this area of institutional design distinguishes itself in the literature.

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\* Juris Doctor Candidate, 2021, Indiana University Maurer School of Law; Master of Arts Candidate for Russian and East European Area Studies, 2021, Indiana University; Bachelor of Arts, 2014, The College of Wooster.

## II. FACTORS SHAPING PRE-PROMULGATION REVIEW MECHANISMS

History,<sup>1</sup> regime type,<sup>2</sup> religious traditions,<sup>3</sup> the power of the judiciary, and the influence of international institutions are a few of the contextual factors that shape the type of pre-promulgation review mechanism a country follows. Other useful characteristics for thinking about the categories are the degree of power possessed by the reviewing institution and the function or purpose of the review. These factors differ from country to country even within each category of the taxonomy.

The regularity and formalization of the pre-promulgation review process determines the power of the body tasked with the responsibility. Even countries that task the same body and have similar procedures for review will establish different degrees of review authority depending on which institutions are authorized to initiate the review process. Review bodies with discretion to review any or all proposed legislation prior to promulgation will have far greater influence over ensuring compliance of legislation with the constitution if the review body may only exercise its review power when called upon by another government actor. Benign and strategic justifications for not employing a process to review all legislation with the formal pre-promulgation mechanism exist. The volume of legislative proposals introduced may make comprehensive review impractical. The degree of formalization of the process in the countries cited for each model is noted in the discussion below.

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<sup>1</sup> In particular, history of colonialism, other institutional legacies, etc.

<sup>2</sup> Such as consolidated democracy, hybrid or illiberal democracy, monarchy, theocracy, etc.

<sup>3</sup> For example, Thailand and Sri Lanka include provisions in their respective constitutions requiring the government to protect and uphold the values of Buddhism. Countries with Islamic law may have pre-promulgation review mechanisms that address consistency with religious doctrine either as a part of or separate from their constitutions. Ran Hirschl, *Comparative Constitutional Law and Religion*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 316, 325, 329 (Rosalind Dixon & Tom Ginsburg eds., 2014).

### III. MODELS OF PRE-PROMULGATION REVIEW

This section presents seven overarching models currently in use by states based on the review body authorized to complete the pre-promulgation review. Building on a combination of country and region-specific scholarship<sup>4</sup> on pre-promulgation constitutional review of legislation, the taxonomy presented here seeks to simplify, generalize, and expand the categories to describe the university of mechanisms developed around the world. In this taxonomy, the categories are organized as follows, and broken down further into related subcategories: (1) Courts, (2) Independent Review Committees, (3) Independent Legal Representatives, (4) Legislatures, (5) the Executive, (6) Religious Authorities, and (7) Institutional Collaboration.

At the outset, it is helpful to clearly define what kind of constitutional review falls within the scope of this taxonomy. Pre-promulgation review is a form of abstract constitutional review.<sup>5</sup> Abstract review is an assessment of the “constitutionality of laws without the need to establish a concrete case or controversy – that is, in the abstract.”<sup>6</sup> Abstract review is about facial constitutionality,<sup>7</sup> in contrast to other forms of judicial review in which constitutionality is assessed in relation to the specific circumstances of a case (concrete review) or an claim of a particular rights violation (constitutional complaint review<sup>8</sup>).<sup>9</sup>

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<sup>4</sup> The taxonomy presented here builds, in part, on Maartje De Visser’s detailed exploration of constitutional review in Europe. De Visser devotes a chapter to describing non-judicial actors engaged in upholding the constitution and discusses in detail the role of constitutional courts engaged in *a priori* review in the European countries that employ these approaches. See generally MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS (2014).

<sup>5</sup> *Id.* at 97 (“Furthermore, *a priori* review is of necessity abstract, as a law that has not yet entered into force cannot have triggered constitutional doubts in the context of an individual case.”).

<sup>6</sup> BENJAMIN BRICKER, VISIONS OF JUDICIAL REVIEW: A COMPARATIVE EXAMINATION OF COURTS AND POLICY IN DEMOCRACIES 5, 7 (2016); see also DE VISSER, *supra* note 4, at 18 (“[I]t’s examination is necessarily *ex ante* and abstract in nature.”).

<sup>7</sup> DE VISSER, *supra* note 4, at 99.

<sup>8</sup> As discussed below, constitutional complaint review can also be a form of pre-promulgation review when raised based on concerns that pending legislation will infringe constitutional rights.

<sup>9</sup> BRICKER, *supra* note 6, at 7.

Each of the models that follow are a form of pre-promulgation, abstract, constitutional review of legislation, categorized by the institution reviewing the legislation. As will be illustrated in the discussions of each category, many intersecting factors – including those identified in the preceding section – and relationships among the institutions involved create levels of complexity and variation even within the categories themselves.

#### A. Courts

In most countries, courts are considered the primary institutions responsible for interpreting and upholding the provisions of the constitution.<sup>10</sup> However, pre-promulgation review is not the most common posture for assessing constitutionality. Ex ante, *a posterior*, concrete review of constitutional violations resulting from promulgated legislation remains the norm.<sup>11</sup> Since World War II, the trend towards creating and granting constitutional courts some form of pre-promulgation review has greatly increased.<sup>12</sup>

##### 1. Constitutional Courts

Constitutional courts are “single, centralized bodies designed to perform constitutional judicial review,” and many “allow institutional actors to directly challenge the constitutionality of laws.”<sup>13</sup> Based on data collected through their research,<sup>14</sup> Tom Ginsburg and Scott Elkins noted that by 2006 81% of constitutional courts had pre-promulgation review powers.<sup>15</sup> A few illustrative examples from the European Union (EU) include France, Hungary, Spain, the Czech Republic, Poland, Germany, Estonia, Ireland, Portugal, Romania, Slovakia, and Slovenia.<sup>16</sup>

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<sup>10</sup> See DE VISSER, *supra* note 4, at 11.

<sup>11</sup> See *id.* at 111.

<sup>12</sup> Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1445 (2009).

<sup>13</sup> BRICKER, *supra* note 6, at 5.

<sup>14</sup> The data was collected through what is now known as the Constitute Project, <https://www.constituteproject.org/>.

<sup>15</sup> Ginsburg & Elkins, *supra* note 12, at 1445.

<sup>16</sup> DE VISSER, *supra* note 4, at 100.

In most countries that follow this approach, courts do not have the power to review any legislative proposals they choose. Another institutional actor, such as the legislature or executive, holds the authority to seek the review of the court. In most countries, the referring institutions are other governmental actors, but in Belgium private actors are also authorized to refer abstract questions of constitutionality to the constitutional court.<sup>17</sup>

## 2. *Constitutional Councils*

Constitutional councils are based on the French model, established in 1958.<sup>18</sup> At its inception, “[t]he *Conseil [C]onstitutionnel*’s principal function consisted of hearing challenges against laws before their promulgation in order to make sure that they did not fall foul of the distribution of powers between the government and Parliament laid down in the 1958 constitution.”<sup>19</sup> The French constitutional council has been “considered the archetype of a court competent to hear a priori constitutionality challenges.”<sup>20</sup> Until 2008, the *Conseil Constitutionnel* had only pre-promulgation review authority and enacted statutes were immune from challenges.<sup>21</sup>

The *Conseil Constitutionnel* strengthened its power by issuing a decision in 1971 claiming the authority to review laws for compliance substantive constitutional provisions and fundamental rights, and in 1974 a constitutional amendment gave minority legislators the authority to request review of legislation – whereas that power had previously been reserved only to the leaders of parliament and the executive and those in the political majority.<sup>22</sup> The historical development is

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<sup>17</sup> *Id.* at 99.

<sup>18</sup> *Id.* at 59.

<sup>19</sup> *Id.* at 60.

<sup>20</sup> *Id.* at 101.

<sup>21</sup> *Id.* at 100.

<sup>22</sup> *Id.*

important, because these features are now considered hallmarks of the constitutional council model of constitutional review, and the institution has been adopted in many other countries.<sup>23</sup>

The model is prevalent in former French colonies, where it was widely adopted.<sup>24</sup> For example, the constitutional courts<sup>25</sup> in Thailand and Cameroon are based on this model.<sup>26</sup> In each case, the model has variations. In Cameroon, the constitutional council is limited to only reviewing legislation at the pre-promulgation stage, rather than holding that power in combination with post-promulgation and concrete review.<sup>27</sup>

In addition to the historical emphasis of the model on pre-promulgation review, two main differences distinguish constitutional councils from constitutional courts. For one, members of constitutional councils, under the French model, are not required to have legal training.<sup>28</sup> Additionally, constitutional councils were designed with an emphasis on their advisory role, in contrast to the power often vested in courts to issue binding decisions on other government actors. It should be noted that in practice neither of these characteristics are strictly delineated between these two institutions. Constitutional courts sometimes include members from nonlegal backgrounds, and some constitutional councils exercise binding authority.<sup>29</sup>

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<sup>23</sup> Tom Ginsburg, *Constitutional Courts in East Asia*, in COMPARATIVE CONSTITUTIONAL LAW IN ASIA, 47, 61 (Rosalind Dixon & Tom Ginsburg eds., 2014) [hereinafter *Constitutional Courts in East Asia*].

<sup>24</sup> *Id.* at 69.

<sup>25</sup> In other countries, the constitutional council model is sometimes labeled a constitutional court, but such examples still fall in this category based on possessing the specific characteristics of the constitutional council model that originated in France.

<sup>26</sup> Tom Ginsburg, *Constitutional Courts in East Asia: Understanding Variation*, 3 J. COMP. L. 80, 88 (2008) [hereinafter *Understanding Variation*]; Charles Manga Fombad, *Protecting Constitutional Values in Africa: A Comparison of Botswana and Cameroon*, 36 COMP. & INT'L L. J. S. AFR. 83, 101 (2003).

<sup>27</sup> Fombad, *supra* note 26, at 99–100.

<sup>28</sup> DE VISSER, *supra* note 4, at 59; *see Understanding Variation*, *supra* note 26, at 92.

<sup>29</sup> *See, e.g.,* DE VISSER, *supra* note 4, at 213 (Italy's constitutional court includes a number of law professors).

### 3. *Committees Within Courts*

This category of pre-promulgation review is effectively a constitutional council situated within the institution of the supreme court. A defining feature of constitutional courts is that they review only questions of constitutional law.<sup>30</sup> In contrast, supreme courts hear issues relating to the legal system as a whole, which may or may not include constitutional issues.<sup>31</sup> An option that falls between authorizing the supreme court to assess constitutional issues and establishing a separate constitutional court is to create a constitutional committee within the supreme court with special expertise and jurisdiction over questions of constitutionality.<sup>32</sup>

Estonia's constitution establishes a constitutional review chamber within the supreme court.<sup>33</sup> In the scope of its pre-promulgation review powers, the president of Estonia may request from the chamber an assessment of legislation proposed by the parliament.<sup>34</sup> In the Estonian system, this authority applies in cases in which the parliament resubmits an act that the president has already returned once without signing into law – a power used sparingly.<sup>35</sup> Algeria's constitution also details the pre-promulgation review process as a consultation with the constitutional council by the legislature and executive.<sup>36</sup> In each of these cases, the court's review committee is not independently authorized to review legislation for constitutionality; it must be prompted to do so by another government actor. This process means only select laws are subjected to pre-promulgation review for constitutionality, and the legislature, executive, and other political bodies are free to bypass this step.

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<sup>30</sup> *Id.* at 95.

<sup>31</sup> *See id.* at 95–96.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 96.

<sup>34</sup> *Id.* at 36.

<sup>35</sup> *Id.*

<sup>36</sup> CONSTITUTION OF THE PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA, Art. 141 (1989).



## *B. Independent Review Committees*

The category of independent review committees is illustrated by two institutions that generally carry out the same function as the court-based bodies above, but that exist as independent and unaffiliated from any branch of the government, and generally do not carry out other duties aside from the primary role of pre-promulgation review of legislation.<sup>37</sup>

### *1. Council of State*

An institution known as a council of state is the main example of pre-promulgation constitutional review of legislation. In Europe this institution has a long history.<sup>38</sup> Councils of state are independent of the other branches and institutions of government and act as advisors to government institutions such as the legislature and the executive.<sup>39</sup> As De Visser defines their role, “They can, and sometimes must, provide advisory opinions on legislative bills and proposals for other legal norms.”<sup>40</sup> This model exists in the EU countries of Belgium, France, Greece, Italy, Luxemburg, the Netherlands, and Spain.<sup>41</sup> In some countries councils of state are the only body tasked with pre-promulgation constitutional review of legislation, as in Belgium and Greece.<sup>42</sup> It is also common for the council to fill its role in conjunction with a separate mandate held by the judiciary or legislature, as in the Netherlands, France (sharing the role with the constitutional council discussed above), Italy, Luxemburg, and Spain.<sup>43</sup> The Dutch Council of State is consulted prior to the passage of every piece of parliamentary legislation and is empowered to issue opinions *sua sponte*, which the government then must take into account.<sup>44</sup> In other systems, the government

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<sup>37</sup> Further examples of institutions that fit the general description may exist under different names in other countries.

<sup>38</sup> DE VISSER, *supra* note 4, at 13.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 14.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 14–15.

must engage the council over its input on legislative constitutionality, but is not required to follow it, as in Belgium.<sup>45</sup>

## *2. Independent Commission for the Supervision of the Constitution*

Constitutional review in Afghanistan is controversially split between the Supreme Court and the Independent Commission for the Supervision of the Constitution.<sup>46</sup> In practice the power is shared between these bodies and each has attempted to carve out a particular type of constitutional jurisdiction, though the line between their respective purviews is not always followed.<sup>47</sup> Since 2010, the commission has established itself in the role of pre-promulgation review of legislative bills in an advisory capacity for both the legislature and the executive and at their request.<sup>48</sup>

## *C. Independent Legal Representatives*

What distinguishes independence legal representatives from court committees and other designated committees for legislative review is that this is a position for a single individual who is not a member of any court, and is meant to be independent from the legislature, executive, and other institutions of the government.

### *1. Chancellors of Justice*

The position of chancellor of justice is an independent position appointed by the president or parliament. According to De Visser's study of constitutional review in Europe, this position exists in Finland, Estonia, and Sweden.<sup>49</sup> In Finland, the constitution calls on the chancellor to ensure the constitutionality and lawfulness of government acts and legislation.<sup>50</sup> The chancellor

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<sup>45</sup> *Id.* at 17.

<sup>46</sup> Shamshad Pasarlay, *Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan*, 26 MICH. ST. INT'L L. REV. 245, 248 (2018).

<sup>47</sup> *Id.* at 249.

<sup>48</sup> *Id.* at 275–77.

<sup>49</sup> DE VISSER, *supra* note 4, at 20

<sup>50</sup> *Id.*; CONSTITUTION OF FINLAND 1999 (rev. 2011), Section 112.

works in close conjunction with the Finnish Constitutional Law Committee, a parliamentary committee discussed below. In Estonia the chancellor reviews proposed legislative for constitutional conformity when called upon by a parliamentary committee; therefore, there is not a mandate for the chancellor's review of every piece of legislation.<sup>51</sup> However, another avenue for the chancellor's influence is in comments on legal drafts included on the parliament's daily agenda. In practice, it is not feasible or necessary for the chancellor to comment on every piece of legislation, but the chancellor has discretion to prioritize which pieces of legislation she addresses, and in the majority of cases the government accounts for her comments in revisions prior to passage.<sup>52</sup>

## *2. Defender or Commissioner of Constitutional Rights*

Another model involving a special judicial expert to assess constitutionality of draft legislation is through an appointed defender or commissioner of constitutional rights “with the task of ensuring that public authorities duly respect individuals’ rights and the freedoms as enshrined in the constitution.”<sup>53</sup> Countries that use this approach in Europe include Finland, France, Hungary, Poland, and Spain.<sup>54</sup> This mechanism can be used either during the pre-promulgation phase as well as to challenge legislation after it has been passed. The defender of constitutional rights role exists in many places outside Europe, though it is more frequently used to challenge post-promulgation applications of statutes and laws that are asserted to be violations of individual rights as applied.<sup>55</sup>

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<sup>51</sup> DE VISSER, *supra* note 4, at 21.

<sup>52</sup> *Id.* at 22.

<sup>53</sup> *Id.* at 45–46.

<sup>54</sup> *Id.* at 46.

<sup>55</sup> *See, e.g.*, BRICKER, *supra* note 6, at 7.

#### *D. Legislatures*

In keeping with allocating primary law-making authority to the legislature, one model is to assign responsibility for ensuring constitutionality of proposed legislation to the legislature as a whole, or to both houses in the case of bicameral legislatures. Bahrain is one example of a country whose constitution follows this model.<sup>56</sup>

##### *1. Upper House*

In bicameral legislatures, the upper house of parliament often plays a greater role in constitutional assessment of legislation, whereas the lower house focuses on political and legislative policy issues.<sup>57</sup> The justification for this is the idea that the upper house is somewhat more removed from daily political pressures, and therefore in a better position to assess neutrally and appeal to constitutional rather than political principles.<sup>58</sup> In the Netherlands, the Senate fills the constitutional assessment role, consistent with this model.<sup>59</sup> The Senate bears the responsibility for upholding the constitution in passing legislation, rather than outsourcing the role to separate institution to provide an outside check.

##### *2. Parliamentary Committees*

Preparatory work in the development of legislation commonly takes place in designated committees composed of members of parliament, which some are specifically tasked with reviewing the constitutionality of legislative proposals.

Finland's Constitution states, "The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 25.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*; *see also* Grondwet voor het Koninkrijk der Nederlanden (Constitution of the Kingdom of the Netherlands) Art. 85.

well as on their relation to international human rights treaties.”<sup>60</sup> The Constitutional Law Committee is comprised of at least seventeen members elected in parliament by secret ballot, and its role is conducted in connection with the role of Finland’s chancellor of justice (discussed above), who refers legislative proposals she deems constitutionally questionable to the committee before the legislature moves forward with its passage.<sup>61</sup> The committee’s process of review begins with a hearing which includes consultations with civil servants and experts, such as professors of constitutional law, followed by an internal meeting where the committee decides its position on the constitutional question and advises the parliament on how to proceed or revise the legislation.<sup>62</sup> The committee’s decisions are not officially binding, but are customarily followed in the Finnish system.<sup>63</sup>

The United Kingdom’s twelve-member House of Lords Constitution Committee was established in 2001 with a mandate to “examine all public bills introduced to the House of Lords for matters of constitutional significance.”<sup>64</sup> The committee requests information and prepares reports on bills that raise “questions of principle about principal parts of the Constitution.”<sup>65</sup> The House of Lords is expected to consider the report and respond to it within two months.<sup>66</sup>

#### *E. The Executive*

A common constitutional provision relating to the executive branch is an assertion of responsibility on the head of state to uphold the constitution. This mandate applies both to the heads’ of states own behavior and policy enactments and in their role as a check on the legislature

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<sup>60</sup> Constitution of Finland 1999 (rev. 2011), Section 74.

<sup>61</sup> DE VISSER, *supra* note 4, at 21, 28.

<sup>62</sup> *Id.* at 27.

<sup>63</sup> *Id.* at 28.

<sup>64</sup> *Id.* at 30.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 30–31.

through the signing of proposed legislation into law.<sup>67</sup> Heads of state may be authorized to assess constitutionality independently and additionally to consult other bodies of review for constitutionality questions. The emphasis in this category as a mechanism of pre-promulgation constitutional review of legislation is that the executive power is exercised based on the justification of an assessment of constitutionality, not some other executive interest.

### *1. Democratic Heads of State: Veto with Constitutional Justifications*

The power to sign legislation vests substantial power in the head of state to determine the validity of legislation, and the executive's approval or refusal to sign may be based on assessments of constitutionality. As a mechanism, the power of heads of state in parliamentary and presidential democracies share basic similarities. In some systems the power described here is exercised by a prime minister and in others by a president. In Estonia, as in many other cases, the president may send back draft legislation for revision if he or she deems it unconstitutional.<sup>68</sup> German federal presidents also have the explicit power to refuse to promulgate legislation they deem to be unconstitutional.<sup>69</sup>

### *2. Constitutional Monarchs*

Constitutional monarchies are varied in the degree of power monarchs have in the final say over whether proposed legislation is constitutional. On one end of the spectrum is Luxemburg, whose constitution was revised in 2009 to remove the requirement of monarchic approval of legislation entirely, rendering executive signature of laws submitted by the legislature a procedural formality.<sup>70</sup> However, on the other extreme another common model of pre-promulgation review

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<sup>67</sup> *Id.* at 36.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 40.

<sup>70</sup> *Id.*; Luxemburg's Constitution of 1868, Art. 34.

empowers the monarch with a high degree of autonomy to determine the constitutionality of legislation without consultation to another review body or deference to the legislature.

Between these extremes is the model followed by Bahrain, which is similar to the role of the head of state in parliamentary and presidential democracies discussed above, in which the king is granted the authority to request review from the constitutional court on the validity of proposed legislation. Bahrain's constitution indicates, "The King may refer to the Court any draft laws before they are adopted to determine the extent of their agreement with the Constitution. The Court's determination is binding on all State authorities and on everyone."<sup>71</sup> The process is a middle ground in terms of the level of power vested in the monarch, because while the king controls which legislation is submitted to the court for review, once the court has opined the king cannot overrule it.

Other countries that employ models falling into one of the other identified categories may involve royal actors. For example, the Dutch monarch is the formal head of the Constitutional Council, but, in practice, the vice-president leads the institution.<sup>72</sup>

#### *F. Religious Authorities*

Many constitutions recognize religious authority as protected or authoritative. Ran Hirschl presents three categories of constitutional and religious authority interplay: (1) "constitutional 'secularism' alongside religious pluralism (e.g. India);" (2) "preferential constitutional treatment of a particular religion or group of religions but without exclusive establishment of a single faith as a 'state religion' or a mandatory source of legislation (e.g. Thailand, Cambodia, Sri Lanka[,] and other predominantly Buddhist countries);" and (3) "varieties of 'Islamic

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<sup>71</sup> Constitution of Bahrain, Art. 106 (2002).

<sup>72</sup> DE VISSER, *supra* note 4, at 15.

constitutionalism’...(i.e. full endorsement of Islam as the single state religion and its establishment as ‘a’ or ‘the’ source of legislation).”<sup>73</sup> The status of religion within the constitution influences how the government will assess religion in pre-promulgation review of legislation.

One example is in the Islamic Republic of Iran where an independent religious authority called the Guardian Council has the constitutional authority to review and determine the compliance of proposed legislation with Islamic principles.<sup>74</sup> The Iranian constitution describes this procedure:

All legislation passed by the Islamic Consultative Assembly [the legislature] must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable.<sup>75</sup>

#### *G. Institutional Collaboration*

The concept behind this category is that multiple actors are simultaneously tasked with specifically considering the constitutional implication of legislation throughout a collaborative drafting process. This approach is in contrast to the process outlined in the above models in which legislative debate and assessment of constitutionality is siloed among various actors at particular stages of legislative drafting, revision, and approval. Instead of establishing a referral mechanism to particular actors to review legislative proposals, multiple government institutions are involved consistently throughout the drafting and revision process – and each of these institutions must specifically consider constitutionality in its assessment.

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<sup>73</sup> Hirschl, *supra* note 3, at 317.

<sup>74</sup> Qanuni Assassi Jumhurii Islamai Iran [The Constitution of the Islamic Republic of Iran] Art. 4, 72, 94, 112 [1980].

<sup>75</sup> *Id.* Art. 94.



The description of this category is drawn from a major legislative reform effort in the Lao People's Democratic Republic.<sup>76</sup> A recent report conducted by the Ministry of Justice of Lao and the United Nations Development Program (UNDP) provides a useful description of their approach to pre-promulgation review:

The notion of a “separation of powers”, with distinct roles and actors in legislative, executive and judicial branches, is not deeply rooted in the current reality of the Lao law-making process. Instead, a collaborative system, with actors from the Ministry of Justice on the executive side, engaged in law drafting efforts with individual members of the National Assembly, results in draft laws taking their shape in the most part before they are finally submitted to the plenary session. Even after the plenary session of the National Assembly holds its debates and suggests revisions, the draft law may return to the original drafters who come from a mix of different line ministries, as well as from the other agencies with the right of legislative initiative.<sup>77</sup>

How this process is developed in Lao and whether other countries adopt this kind of approach will clarify the definition of this category. At this stage, the purpose and method suggest a distinct approach to pre-promulgation constitutional review of legislation.

### III. RELEVANCE OF TAXONOMY AND FUTURE RESEARCH

This taxonomy of pre-promulgation review models intends to assist scholars and policymakers in understanding the range of design options for ensuring legislative constitutionality. It provides a framework of models from which to extend analysis to the application and implication of using particular models to better understand their operation in practice. From this starting point, several areas for further research are proposed below.

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<sup>76</sup> See generally, UNDP, *The Law-Making Process in Lao PDR: A Baseline Study*, Ministry of Justice and UNDP LAO PDR (2015), [http://www.la.undp.org/content/dam/laopdr/docs/Reports and publications/2015/2015-12-15 Baseline report-final version.pdf](http://www.la.undp.org/content/dam/laopdr/docs/Reports%20and%20publications/2015/2015-12-15%20Baseline%20report-final%20version.pdf) (last visited Sep. 9, 2018).

<sup>77</sup> *Id.* at 14.

### *A. Roles of Pre-Promulgation Review*

The official role of pre-promulgation review is to review legislation to ensure proposed laws are consistent with the constitution prior to their passage; however, the practice may serve a number of governmental goals, towards both legitimate and informal ends. The function served by pre-promulgation review may be shaped by the type of model employed. Future analyses could further explore the association of particular pre-promulgation review models with different goals. The goals suggested by this initial research include: (1) approving legislation, (2) recommending revision to proposed legislation, (3) rejecting proposed legislation as incompatible with the constitution, (4) rejecting proposed legislation for political or public policy reasons, (5) stalling or preventing passage of legislation by governmental actors opposed to the law.

### *B. Multiple Institutions and Overlapping Mandates*

Review by multiple committees can be of the same piece of legislation at different points in its review and approval process, or legislation may be siloed by topic and sent to a particular committee based on subject matter. A number of countries discussed above involved several institutions overlapping to some degree in their pre-promulgation review role. In such cases, institutions may be tasked with review of particular types of legislation or at different points in the timeline of the legislative process. In addition to those cited above, a few cases are notable for the complexity and number of actors involved in the pre-promulgation review process to assess constitutionality. A central question that arises from this dynamic is the effect of combining different approaches. Closer comparative case studies of countries in this taxonomy may yield helpful information about how different actors and mechanisms may or may not work well together.

### *C. Evaluating Power Dynamics of the Mechanism in Context*

Many of the sources that informed this taxonomy include the scholar's perspectives about whether and which of these systems of pre-promulgation constitutional review are effective and in what contexts. This study refrains from commenting on these issues, but the taxonomy could be the basis for a study that inquired into how each mechanism operates in practice across countries. Such a framework may aid further study into questions of what works well in particular types of systems and what options are available to scholars and policy makers seeking to reform or introduce new approaches.

### *D. Expanding and Refining the Categories*

The best way to test the categories presented in this taxonomy is to expand the analysis to additional countries and to seek to fit those new data points into the framework. Constitutions are a useful place to begin this inquiry. However, while the mechanism for constitutional review may be referenced in a country's constitution, such provisions often do not specify when or how review should occur. Furthermore, scholarship from country-specific experts often indicates that the process is far different in practice from what the constitution proscribes. A case that does not fit the proposed taxonomy may yield an addition or restructuring of the categories. Further research in this vein will contribute to an improved understanding of pre-promulgation constitutional review of legislation. The country index below contains a list of all the country cases included in this initial study.

## IV. CONCLUSION

The categories proposed herein are a possible framework to think broadly and comparatively about the design options for pre-promulgation review mechanisms. The overview presented here illustrates the need for further study of pre-promulgation review mechanisms as this

step in the legislative process receives growing recognition as a meaningful governmental design question. Few comprehensive analyses of the role of legislatures and other actors in the legislative drafting process in upholding constitutionality have been conducted.<sup>78</sup> The mechanism selected appears to have the potential to change power dynamics in government; therefore, policy makers may seek to alter the approach in their countries either through procedural changes or formal constitutional amendments, could elevate the influence of the constitution in controlling legislation and have major implications for government policy.

#### V. COUNTRY INDEX<sup>79</sup>

| Country     | Model                             | Subcategory  | Title of Review Body<br>(original language where available)    |
|-------------|-----------------------------------|--|--|
| Afghanistan | Independent Review Committees     | Independent Commission for the Supervision of the Constitution | Independent Commission for the Supervision of the Constitution |
| Algeria     | Courts                            | Committees within Courts                                       | Constitutional Council <sup>80</sup>                           |
| Bahrain     | The Executive                     | Constitutional Monarch   | King submits to Constitutional Court <sup>81</sup>             |
|             | Legislatures                      | Parliamentary Committees                                       | Chamber of Deputies, National Assembly <sup>82</sup>           |
| Belgium     | Independent Review Committees     | Councils of State  | Council of State <sup>83</sup>                                 |
| Cameroon    | Courts                            | Constitutional Council   | Constitutional Council <sup>84</sup>                           |
| Estonia     | Courts                            | Committees within Courts                                       | Constitutional Review Chamber <sup>85</sup>                    |
|             | Independent Legal Representatives | Chancellors of Justice   | Chancellor of Justice ( <i>Õiguskantsler</i> ) <sup>86</sup>   |

<sup>78</sup> DE VISSER, *supra* note 4, at 23.

<sup>79</sup> Data collected from Constitute Project, <https://www.constituteproject.org/>.

<sup>80</sup> Constitution of the People's Democratic Republic of Algeria, Art. 141 (1989).

<sup>81</sup> Constitution of Bahrain, Art. 106 (2002).

<sup>82</sup> *Id.*

<sup>83</sup> DE VISSER, *supra* note 4, at 13.

<sup>84</sup> Constitution of Cameroon, Art. 471 (2008).

<sup>85</sup> DE VISSER, *supra* note 4, at 36.

<sup>86</sup> *Id.* at 21.

|         |                                   |  |  |
|---------|-----------------------------------|--|--|
|         | The Executive                     | Democratic Head of State: Veto with Constitutional Justification | President <sup>87</sup>  |
| Finland | Independent Legal Representatives | Chancellors of Justice   | Chancellor of Justice ( <i>Oikeuskansleri</i> ) <sup>88</sup>                |
|         | Independent Legal Representatives | Defender or Commissioner of Constitutional Rights                | -  |
|         | Legislatures                      | Parliamentary Committees   | Constitutional Law Committee ( <i>Perustuslakivaliokunta</i> ) <sup>89</sup> |
| France  | Courts                            | Constitutional Council   | Constitutional Council ( <i>Conseil constitutionnel</i> ) <sup>90</sup>      |
|         | Independent Legal Representatives | Defender or Commissioner of Constitutional rights                | -  |
|         | Independent Review Committees     | Councils of State  | Council of State <sup>91</sup>   |
| Germany | The Executive                     | Democratic Head of State: Veto with Constitutional Justification | Federal President <sup>92</sup>  |
| Greece  | Independent Review Committees     | Councils of State  | Council of State <sup>93</sup>   |
| Hungary | Courts                            | Constitutional Courts  | Constitutional Court <sup>94</sup>   |
|         | Independent Legal Representatives | Defender or commissioner of constitutional rights                |  |
| Iran    | Religious Authorities             | -  | Islamic Consultative Assembly submits to the Guardian Council <sup>95</sup>  |
| Italy   | Independent Review Committees     | Councils of State  | Council of State <sup>96</sup>   |

<sup>87</sup> *Id.* at 36.

<sup>88</sup> *Id.* at 20.

<sup>89</sup> *Id.* at 26.

<sup>90</sup> *Id.* at 7.

<sup>91</sup> *Id.* at 13.

<sup>92</sup> *Id.* at 40.

<sup>93</sup> *Id.* at 13.

<sup>94</sup> *Id.* at 6.

<sup>95</sup> Qanuni Assassi Jumhurii Islamai Iran [The Constitution of the Islamic Republic of Iran] Art. 94 [1980].

<sup>96</sup> DE VISSER, *supra* note 4, at 13.

|                 |                                   |   |   |
|-----------------|-----------------------------------|---|---|
| Lao PDR         | Institutional Collaboration       | -   | Ministry of Justice, National Assembly, original drafters, other ministries <sup>97</sup> |
| Luxemburg       | The Executive                     | Constitutional Monarch                            | Procedural signature only <sup>98</sup>   |
|                 | Independent Review Committees     | Councils of State                                 | Council of State <sup>99</sup>  |
| The Netherlands | Legislatures                      | Upper House                                       | Senate ( <i>Eerste Kamer</i> ) <sup>100</sup>   |
|                 | Independent Review Committees     | Councils of State                                 | The Dutch Council of State <sup>101</sup>   |
| Poland          | Independent Legal Representatives | Defender or Commissioner of Constitutional rights | -   |
| Spain           | Independent Legal Representatives | Defender or Commissioner of Constitutional rights | -   |
|                 | Independent Review Committees     | Councils of State                                 | Council of State <sup>102</sup>   |
| Thailand        | Courts                            | Constitutional Council                            | Constitutional Council <sup>103</sup>   |
| United Kingdom  | Legislatures                      | Parliamentary Committees                          | House of Lords Constitution Committee <sup>104</sup>                                      |
|                 |                                   |   |   |

<sup>97</sup> UNDP, *supra* note 76, at 14.

<sup>98</sup> *Id.* at 40.

<sup>99</sup> *Id.* at 13.

<sup>100</sup> *Id.* at 25.

<sup>101</sup> *Id.* at 14–15.

<sup>102</sup> *Id.* at 13.

<sup>103</sup> *Constitutional Courts in East Asia*, *supra* note 23, at 61.

<sup>104</sup> DE VISSER, *supra* note 4, at 30.